Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

GAVIN GUTRIDGE,

Petitioner,

vs.

MIDLAND COMPUTER, INC., d/b/a COMPUTERLAND OF NEBRASKA a/k/a COMPUTERLAND; and WAYNE CLURE as President of Computerland, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD A. ROWLAND
Counsel of Record
PHILLIP G. WRIGHT
ADAM J. SIPPLE
MICHAEL F. GUTOWSKI
QUINN & WRIGHT
470 Continental Building
209 S. 19th Street
Omaha, NE 68102
(402) 344-0400
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4688

QUESTION PRESENTED FOR REVIEW

Whether the Circuit Court of Appeals for the Eighth Circuit has properly interpreted and applied the definition of "disability" pursuant to the Americans With Disabilities Act in order to accomplish the purposes of the Act.

PARTIES

The parties to the proceeding in the Eighth Circuit Court of Appeals, whose judgement is sought to be reviewed, are the Petitioner, Gavin Gutridge, and the Respondents, Wayne Clure and Midland Computer, Inc.

Wayne Clure is president of Midland Computer, Inc. and was a party in both his individual capacity and in his capacity as president of Midland Computer, Inc.

Midland Computer, Inc. does business as Computerland of Nebraska and is commonly known as Computerland.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, GAVIN GUTRIDGE, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the Order of the United States District Court for the District of Nebraska granting Respondents' Motion for Summary Judgment and dismissing Gutridge's Petition. The Petitioner claims reversible error occurred in both the District and Circuit Courts.

OPINIONS BELOW

On December 11, 1998, the United States Court of Appeals for the Eighth Circuit denied Gutridge's Petition, filed on September 4, 1998, for rehearing of the Circuit Court's opinion, entered on August 2, 1998. The decision appealed to the Circuit Court is the Memorandum and Order and Judgment of Dismissal entered by the United States District Court for the District of Nebraska on November 26, 1997. The Petitioner timely filed a Notice of Appeal of the District Court judgment on December 18, 1997.

JURISDICTION

The United States District Court maintained subject matter jurisdiction pursuant to 28 U.S.C. §1331, as Petitioner's claim was brought under the Americans with Disabilities Act. (42 U.S.C. §12101-12213).

The United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291, as Petitioner appeals from a final judgment that disposes of all claims with respect to all parties. Said judgment was entered by District Judge Joseph F. Bataillon on November 26, 1997, and Petitioner timely filed his Notice of Appeal on December 18, 1997. Appellate jurisdiction is also based upon 42 U.S.C. §2000e-5(j).

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §12102(2):

> (2) Disability, The term "disability" means, with respect to an individual:
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. §12112(a):

> (a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below

The Petitioner, Gavin Gutridge, is a former employee of Midland Computer Inc., d/b/a Computerland of Nebraska (hereinafter "Computerland"). Wayne Clure is the President of Computerland. In October 1990, Computerland hired Petitioner as a Service Technician. Beginning in March, 1993, Petitioner sustained various injuries causing pain in his wrists, hands, and elbows while working for Computerland. After a long course of treatment involving five separate surgical procedures, wraps, splints, and pain-killing medication, Petitioner's physician released him to work "light duty" and imposed lifting restrictions. On June 22, 1995, Computerland terminated Petitioner's employment based upon his permanent lifting restriction.

The Americans with Disabilities Act ("the Act") prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. §12112(a). Petitioner sought relief under the Act by filing a Complaint in the United States District Court for the District of Nebraska. The original Complaint named Clure and erroneously named "Vanstar Corp. d/b/a Computerland" as defendants. On January 23, 1997, Clure filed an Answer to the original Complaint wherein Clure denied each of the material allegations contained in the Complaint. On February 26, 1997, and after dismissing the Complaint against Vanstar Corp., Petitioner filed an Amended Complaint naming both Clure and "Midland Computer Inc., d/b/a, Computerland of Nebraska a/k/a Computerland" as defendants.

On September 15, 1997, Clure and Computerland filed a Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 "for the reason that the Defendants are entitled to a judgment as a matter of law and that there is no genuine issue of material fact to be tried." On October 17, 1997, Petitioner moved for summary judgment on three separate issues, including "that he is a 'disabled person' as defined by the Americans with Disabilities Act." *See* 42 U.S.C. §12102(2)(A)-(C). Petitioner has asserted and continues to assert that he is covered by the Act as an "individual with a disability" as that term is defined by both subsections (A) and (B) of 42 U.S.C. §12102(2). On November 26, 1997, the United States District Court granted Computerland and Clure's motion for summary judgment, denied Petitioner's motion, and entered a judgment dismissing the Complaint with prejudice.

By its Memorandum and Order, the District Court limited its discussion to whether the lifting restriction constituted a disability pursuant to subsection (A) of 42 U.S.C. §12102(2), specifically, whether the restriction substantially limits one or more of Petitioner's "major life activities." The District Court cited various cases addressing subsections (A) and (C). The District Court did not discuss whether Petitioner provided sufficient evidence of a "record of such a disability" under subsection (B) of 42 U.S.C. §12102(2). Specifically, the District Court did not discuss or make a finding as to whether Petitioner's course of surgical treatment, wraps, splints, and medication had limited his "major life activities," as that term is defined by applicable Equal Employment Opportunity Commission regulations.

On December 18, 1997, Petitioner filed his Notice of Appeal. On August 26, 1998, the Circuit Court of Appeals for the Eighth Circuit issued its opinion affirming the judgment of the District Court. (Appx. A). Petitioner timely filed a Petition for Rehearing, which was denied by the Circuit Court without opinion on December 11, 1998 (Appx. D)

Statement of Facts

Computerland is a corporate reseller concentrating primarily on the sale and service of computer needs to commercial customers throughout eastern Nebraska and western Iowa. The company employed approximately seventy employees from 1990 through 1995. Wayne Clure is the President of Computerland.

Computerland hired Petitioner as a Computer Service Technician in October, 1990. The primary function of a Computerland Computer Service Technician is the configuration, set up, and replacement of computers and computer-related components. Petitioner's duties as an employee of Computerland were to troubleshoot and repair microcomputers, terminals, printers, and related peripherals both at the company office ("the shop") and at customers' places of business ("on-site").

On March 16, 1993, Petitioner was lifting a monitor when his left wrist snapped and he began experiencing pain and numbness in his wrist, hand, and fingers. Petitioner sought medical treatment at a local hospital emergency room where x-rays were taken and an Ace bandage placed on his wrist. Despite the bandage, the pain persisted and Dr. David Clough later placed the wrist in a

cock-up splint. The splint limited Petitioner's ability to perform manual tasks with his left hand. Between March 16, 1993, and September 1993, Petitioner began experiencing pain and numbness in his right wrist, hand, and fingers as well. On August 23, 1993, Petitioner underwent surgery on his left hand for carpal cubital tunnel syndrome. On September 27, 1993, Petitioner underwent surgery on his right hand, also for carpal cubital tunnel syndrome. Both of the aforementioned surgeries were part of an effort to alleviate the pain and numbness Petitioner had experienced and which were affecting his daily life. The aforementioned surgeries were the beginning of a long course of treatment involving further surgeries, medication to relieve pain, injections, and other treatments. Medical records from Dr. David Clough, Dr. Edward Schima, and Kathleen Wilwerding describe portions of Petitioner's treatment. Respondents maintained the records in Petitioner's workers' compensation or personnel file.

Petitioner returned to work as a Service Technician after the first surgery on August 27, 1993, and after the September 27th surgery, using the assistance of others when lifting. After having surgery, Petitioner began developing weakness in his right hand, which caused the strength of his grip to gradually deteriorate. The weakness precluded Petitioner from performing manual tasks such as opening jars in the kitchen. On February 21, 1994, Petitioner was admitted to Midlands Hospital and underwent surgery on his right elbow.

While the surgeries have at times provided some relief, pain and weakness in Petitioner's right hand has persisted, making him unable to write for more than ten

minutes at a time and only with a large foam grip on the pen. On August 22, 1994, Petitioner underwent surgery on his right elbow as part of further efforts to alleviate the pain and injuries described above. On November 15, 1994, Petitioner underwent surgery on his upper left arm as part of further efforts to alleviate the pain and injuries.

As a result of the injury and surgical interventions described above, Petitioner was placed on medical restrictions with varying lifting restrictions and was, at times, instructed to limit his work activity to a sedentary position with virtually no lifting at all. On June 19, 1995, Petitioner was released by Dr. Clough to return to work light duty with the permanent restrictions that he lift forty-five pounds only five percent of the work day, thirty-five pounds thirty-three percent of the time, twenty pounds twenty percent of the time, and could lift ten pounds consistently. On or about June 22, 1995, Computerland terminated Petitioner's employment based upon the physician's written lifting restriction, claiming that it did not have any positions for "light duty" computer technicians. According to Computerland's director of personnel, Robert Keefe, Petitioner's "abilities as a service technician are above average."

REASONS FOR GRANTING THE WRIT

Carpal cubital tunnel syndrome is a medical condition which has caused pain and weakness in Petitioner's hands, wrists, and arms. Treatment of the condition has necessitated five separate surgeries, wraps, splints, and

painkilling medication. During the extended period of Petitioner's treatment, the pain caused by the condition made him unable to lift most computer equipment, open jars, mow the lawn, till the garden, move furniture, or drive a vehicle with manual steering. After treatment of the condition, Petitioner's physician imposed a permanent lifting restriction prohibiting Petitioner from lifting in excess of 45 pounds more than 5 percent of the workday. As he argued in the District Court, this period of injury and treatment, *along with* the permanent impairment reflected by the lifting restriction, constitutes a "record of physical . . . impairment" substantially limiting his performance of "major life activities" as those terms are defined by applicable EEOC regulations. 42 U.S.C. §12102(2)(B).

This case is different than those relied upon by the District Court because Petitioner relies upon subsection (B) of 42 U.S.C. §12102(2), providing protection to those with a "record of impairment", in addition to subsection (A), which provides protection to those with a physical impairment which "limits one or more major life activities." 42 U.S.C. §12102(2)(A)-(B). The District Court erred by limiting its analysis to whether the lifting restriction, alone, substantially limits Petitioner's "major life activity" of "working". First, EEOC regulations define the term "major life activities" to include not only working, but "manual tasks" and "lifting" as well. Second, Petitioner has contended that his long course of pain, impairment, surgical treatment, and medication establishes a "record of impairment." 42 U.S.C. §12102(2)(B). In support of his motion, Petitioner submitted an affidavit, along with numerous medical records from his file in the

possession of Respondents. The evidence clearly establishes a record of Petitioner's substantial impairment concerning the "major life activities" of "working", "lifting", and performing other "manual tasks" like driving a car with manual steering. This evidence constitutes a "record of impairment" under the Act.

In light of Petitioner's reliance upon subsection (B) of 42 U.S.C. §12102(2), the District Court's ruling also conflicts with the decision of the United States Supreme Court in *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). At issue in *Arline* was whether a teacher diagnosed with tuberculosis was entitled to protection under the Rehabilitation Act. She had been diagnosed and hospitalized with the disease in 1957, suffered reoccurrence of the disease in her system in 1977, and was later terminated from her teaching position. With respect to whether the teacher's condition qualified her for protection under the Rehabilitation Act, the Supreme Court stated, " . . . Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a 'record of . . . impairment' with the meaning of 29 U.S.C. §706(7)(B)(ii), and is therefore a handicapped individual." 107 S.Ct. at 1127.

In addition to acknowledgment of the legal significance of the employee's history, or record, of impairment, the Supreme Court's analysis is important for another reason. The Supreme Court rigidly adhered to regulatory definitions of the terms used in the statutory definition. 107 S.Ct. at 1127. The Court noted that the regulations "were drafted with the oversight and approval of Congress [and] provide an important source of guidance on [the definition of 'handicapped individual']." *Id.* This

Court must therefore rely upon the regulations to determine the meaning of the Act's terms. Application of the terms to the uncontroverted evidence produced by Petitioner herein requires reversal of the District Court's order granting summary judgment.

The regulations promulgated by the Equal Employment Opportunity Commission which define the critical statutory terms of the Act are identical to those promulgated by the Department of Health and Human Services and interpreted in *Arline*.

"Disability" means:

> (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (2) A record of such an impairment;
>
> (3) Being regarded as having such an impairment.

29 C.F.R. §1630.2(g). "Physical impairment" means:

> a physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

29 C.F.R. §1630.2(h). The definition of "substantially limits" includes the following:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or

> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration the average person in the general population can perform that same major life activity.

29 C.F.R. §1630.2(j)(1)(i)(ii). "Major life activities" means:

> Functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. §1630.2(i). (Emphasis added). In the commission's comments to the regulations, 29 C.F.R. part 1630 Appx., Sec. 1630.2(1), it is noted that the above list is not exhaustive:

> This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. *See* Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

In *Arline*, the Supreme Court held that the teacher's hospitalization in 1957 was a fact "more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment." 107 S.Ct. at 1127.

Similarly, Petitioner's five separate surgeries, wraps, splints, medication, work restrictions, and inability to perform simple household tasks, a record of which was maintained by Defendants, establishes a "record of impairment" in this case.

Petitioner submits that the import of *Arline* is painfully simple: If a condition which meets the definition of

"physical impairment" requires hospitalization, then there is evidence sufficient to create a genuine issue of material fact as to whether it limits major life activities. This is because people do not generally go through five separate surgeries, hospital stays, or utilize wraps, splints, and medication unless their major live activities are affected by their condition.

Based upon this authority, the Act, and EEOC regulations implementing the Act and defining its terms, the District Court erred by granting summary judgment in favor of Defendants.

The Court of Appeals overlooked or misapprehended Petitioner's argument that, in addition to substantially limiting his major life activities of working and lifting, his impairment substantially limits his major life activity of performing simple manual tasks. 29 C.F.R. §1630.2(i).

Under the ADA passed by Congress, an individual has a "disability" entitling him to the protection afforded by the Act if (A) he has a physical or mental impairment that substantially limits one or more of his "major life activities", (B) he has a record of a physical or mental impairment which limited his "major life activities"; *or* he is regarded as having an impairment substantially limiting one or more of his "major life activities." 42 U.S.C. §12102(2). Although the District Court began its discussion by recognizing this definition of "disability", it limited the remainder of its analysis to whether Petitioner's physical condition at the time of his termination is one which would limit his "major life activities." *See* 42 U.S.C. §12102(2)(A). The District Court did not address, even in passing, whether Petitioner's long course of injuries,

pain, or surgical treatment constituted a "record of . . . impairment" under the Act. *See* 42 U.S.C. §12102(2)(B); *School Bd. Of Nassau County v. Arline, supra.*

Under the EEOC regulations, an impairment is substantially limiting if the individual is unable to perform a major life activity that the average person in the general population can perform. 29 C.F.R. §1630.2(j)(1)(i).

Petitioner presented evidence that the pain caused by his permanent physical impairment has made him unable to lift most computer equipment, open jars, mow the lawn, till the garden, move furniture, or drive a motor vehicle with manual steering. This evidence must be considered sufficient, when coupled with the limitations imposed upon Petitioner's major life activities of lifting and working, to create a genuine issue of fact as to whether he is disabled under 42 U.S.C. §12102(2).

The Circuit Court although citing *Taylor v. U.S. Postal Service*, 946 F.2d 1214 (6th Cir. 1991), in its opinion, *Gutridge v. Clure, et al.* 153 F.3d 898, 901 (8th Cir., 1998), (Appx. 7), proceeds to decide this case in opposition to the conclusion reached in *Taylor.* In that case an applicant for a postal service position successfully claimed "record of physical impairment" entitling him to protection under the Rehabilitation Act.

A case decided by the Tenth Circuit Court of Appeals subsequent to the oral argument before the Eighth Circuit, supports the Petitioner's position. In *Aldrich v. Bowing Company,* 1998 W.L. 351034 (10th Cir. 1998) (Decided August 7, 1998) the court concluded that an impairment may be substantially limiting for the purposes of the

ADA during the recovery period prior to the issuance of a permanent disability rating by the treating physician. Based on the reasoning of *Aldrich* therefore it is of no moment that portions of Petitioner's impairment manifested themselves during his different periods of recovery.

Furthermore a recent decision of this Court in *Bragdon v. Abbot*, 118 S.Ct. 2196 (Decided June 25, 1998), supports a broad interpretation of "major life activities". 118 S.Ct. at 2205 (finding reproduction to be a major life activity, despite lack of reference to it in act or regulations.). The Circuit Court should have considered whether the Petitioner is "substantially limited" by his impairment's cumulative effect on performance of all the major life activities he has identified. To separately consider the impact of the impairment on each major life activity is contrary to the Act's broad definition of the term.

Further, because Petitioner's evidence concerning his medical condition and course of treatment is uncontested, summary judgment should have been granted in his favor on the threshold issue of whether he is a "individual with a disability" within the meaning of the Act.

CONCLUSION

Considering all of the above it is clear that the Circuit Court's decision is in serious conflict with applicable decisions of the Supreme Court, other Circuit Courts, the Americans with Disabilities Act and applicable regulations. Both the District Court and the Circuit Court have

seriously misinterpreted and misapplied the Act and the decisions of this Court by too narrowly construing the group of persons covered by the Act.

If this decision is allowed to stand, it will seriously impair the effectiveness of the Americans with Disabilities Act and its ability to afford the relief to persons with disabilities as intended by Congress.

Petitioner believes that this case warrants further review, and requests that a Writ of Certiorari be issued to review the decision of the Eighth Circuit Court of Appeals. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GAVIN GUTRIDGE, *Petitioner*

RICHARD A. ROWLAND
Counsel of Record
PHILLIP G. WRIGHT
ADAM J. SIPPLE
MICHAEL F. GUTOWSKI
QUINN & WRIGHT
470 Continental Building
209 S. 19th Street
Omaha, NE 68102
(402) 344-0400
Attorneys for Petitioner

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APPENDIX A

Gavin GUTRIDGE, Appellant,

v.

Wayne CLURE, as president of Computerland, Individually; Midland Computer, Inc., doing business as Computerland of Nebraska, also known as Computerland, Appellees.

No. 98-1189.

United States Court of Appeals,
Eighth Circuit.

Submitted June 12, 1998.

Decided Aug. 26, 1998.

Adam J. Sipple, Omaha, NE, argued (Phillip G. Wright, on the brief), for Appellant.

Jeffrey Craig Miller, Omaha, NE, argued (Duncan A. Young, on the brief), for Appellee.

Before BOWMAN, Chief Judge, LOKEN, Circuit Judge, and MAGNUSON,[1] District Judge.

BOWMAN, Chief Judge.

Gavin Gutridge sued Midland Computer, Inc., doing business as Computerland of Nebraska, and its president, Wayne Clure (hereinafter collectively referred to as "Computerland"), for discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213 (1994). Both parties moved for summary judgment.

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[1] The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

The District Court[2] granted Computerland's motion, denied Gutridge's motion, and dismissed the suit with prejudice. Gutridge appeals, claiming that the District Court erred in finding that he was not disabled under the ADA.

I.

Computerland sells computers and related products to businesses and provides maintenance for those computer products almost exclusively at the customer's place of business, or on-site. Computerland hired Gutridge as a computer service technician in October 1990. Gutridge's duties included the installation, repair, and service of computer equipment sold to Computerland's customers. In performing these duties, Gutridge was required to lift computer equipment both at the store and on-site, transport computer equipment between the customer site and Computerland's shop, and move on-site objects such as desks, shelves, and chairs.

In March 1993, Gutridge was lifting a computer monitor when his left wrist snapped, causing pain and numbness in his wrist, hand, and fingers. Gutridge received medical treatment and was eventually diagnosed with carpel tunnel syndrome and cubital tunnel syndrome in both his left and right wrists. Thereafter, through June 1995, Gutridge underwent five separate surgeries on his left and right wrists and elbows. After each surgery, Gutridge was placed by his doctors on

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[2] The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

various lifting restrictions and returned to work. During this time, Computerland assigned Gutridge to a temporary position requiring only light duty, in-shop services. On June 19, 1995, Gutridge's treating physician issued a written release to return to work with the permanent restriction that he may lift forty-five pounds 5% of the work day, thirty-five pounds 33% of the work day, twenty pounds 20% of the work day, and ten pounds consistently. A few days later, Computerland terminated Gutridge's employment. In its letter of termination to Gutridge, Computerland stated:

> We have been informed that your rehabilitation program has ended and that the medical restrictions as identified by Dr. David Clough are now rated as permanent. That condition unfortunately prevents you from being able to fully accomplish the tasks necessary to perform your job functions.

J.A. at 24. Three and one-half weeks later, Gutridge was hired as a computer service technician by a company that repaired computers both in-shop and on-site.

II.

We review de novo a district court's grant of summary judgment. *See Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir.1995). We affirm the judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The ADA prohibits employers from discriminating "against a qualified individual with a disability because

of the disability of such individual." 42 U.S.C. § 12112(a). To establish a claim under the ADA, a plaintiff must show "that he has a disability as defined in 42 U.S.C. § 12102(2); that he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he has suffered adverse employment action because of his disability." *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir.1995) (citing *Wooten*, 58 F.3d at 385). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Gutridge first claims that he is disabled under § 12102(2)(A) because his permanent lifting restriction, he argues, substantially limits one or more of his major life activities. The Equal Employment Opportunity Commission regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1997). Gutridge argues that his carpel tunnel syndrome and cubital tunnel syndrome, which resulted in him being placed on a permanent lifting restriction, substantially limits his major life activity of working. "Substantially limits" with respect to the major life activity of working means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *Id.* § 1630.2(j)(3)(i). The regulations further state that "[t]he inability to perform a single, particular job does not constitute a substantial limitation." *Id.*

Gutridge has failed to present evidence that he is substantially limited in the major life activity of working. *See Robinson v. Neodata Servs. Inc.*, 94 F.3d 499, 501-02 (8th Cir.1996) (finding that a permanent lifting restriction, which rendered plaintiff unable to perform the primary function of her previous position, did not substantially limit her major life activity of working). Gutridge's carpel and cubital tunnel syndromes have left him unable to perform the job of a Computerland service technician given the nature of Computerland's exclusive on-site repair business. He is still able, however, to function as a computer repair technician for other employers who either do not require lifting as part of their job duties or can provide assistance. Indeed, Gutridge has found such employment.

Gutridge also contends that his permanent lifting restriction substantially limits his major life activity of lifting. The EEOC regulations include lifting as an example of a major life activity. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(i). A permanent lifting restriction of not more than 45 pounds, however, neither renders him "[u]nable to perform" nor "[s]ignificantly restrict[s]" his activity of lifting. 29 C.F.R. § 1630.2(j)(1)(i), (ii). Further, we have held that, "[w]hile lifting is noted under the regulations as a major life activity, a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA." *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir.1997) (citing *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 617 (8th Cir.1997) and *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir.1996)). We find that Gutridge's permanent lifting restriction does not

impose a substantial limitation on his major life activity of lifting.

Finally, Gutridge argues that he disabled under § 12102(2)(B) because "his five separate surgeries, wraps, splints, medication, work restrictions, and inability to perform simple manual tasks" created a record of impairment. Gutridge Br. at 14. For support, Gutridge relies on *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). In *Arline*, the Supreme Court held that a school teacher's hospitalization for tuberculosis nearly twenty years prior to her termination established a record of impairment, and that she was therefore handicapped under the Rehabilitation Act.[3] *See Arline*, 480 U.S. at 281, 107 S.Ct. 1123. The Court stated that the tuberculosis "was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited." *Id.* Gutridge thus contends that, if hospitalization twenty years previous was sufficient in *Arline* to establish a record of impairment, then his course of treatment should also suffice. We disagree.

We do not interpret *Arline* to mean that simply being hospitalized establishes a record of impairment under the ADA. *See Demming v. Housing and Redevelopment Auth., of Duluth, Minnesota*, 66 F.3d 950, 955 (8th Cir.1995). Such an interpretation would establish the "nonsensical proposition that *any* hospital stay is sufficient to evidence a

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[3] Cases interpreting the definition of "handicap" under the Rehabilitation Act are instructive for purposes of interpreting "disability" under the ADA. *See Wooten v. Farmland Foods*, 58 F.3d 382, 385 n. 2 (8th Cir.1995).

'record of impairment.' " *Taylor v. United States Postal Serv.*, 946 F.2d 1214, 1217 (6th Cir.1991). We reject such a reading of *Arline*. Unfortunately, the Court in Arline offered little detail regarding the teacher's actual length of hospital stay or the severity of her affliction. Thus, we find *Arline* to offer little guidance.

The EEOC regulations state that "a record of such impairment" means "a history of . . . a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). Gutridge has failed to show that one or more of his major life activities was substantially limited. Moreover, we reject Gutridge's argument that such a record of impairment was established during his period of treatment and recovery. Disability under the ADA requires permanent or long-term impairments, *see* 29 C.F.R. Pt. 1630, App. § 1630.2(j), and impairments while recovering from surgery are not evidence of a permanent disability, *see Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir.1997).

We conclude that Gutridge has failed to present a genuine issue of fact that he is disabled within the meaning of the ADA. In so doing, we necessarily reject Gutridge's argument that the District Court erred in dismissing his motion for summary judgment. We therefore affirm the District Court's grant of summary judgment to Computerland.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GAVIN GUTRIDGE, Plaintiff, v. MIDLAND COMPUTER, INC., d/b/a COMPUTERLAND OF NEBRASKA a/d/a COMPUTERLAND; and WAYNE CLURE, as President of ComputerLand Individually, Defendants.	)	8:97CV3 MEMORANDUM AND ORDER (Filed Nov. 26, 1997)

The plaintiff, after receiving a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission (EEOC), filed this disability discrimination action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 121101 - 12213 (1996), and the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1126 (Reissue 1993).

Both parties have moved for summary judgment (Filing Nos. 29 (defendants) and 38 (plaintiff)). Defendants ComputerLand and Clure contend that plaintiff Gutridge has failed to prove a prima facie case under the ADA because 1) the plaintiff, Gavin Gutridge, is not a disabled person within the meaning of the ADA; 2) he is not able to perform, with or without reasonable accommodation, the essential functions of the job in question; and 3) he

was not terminated because of the impairment. Plaintiff Gutridge filed a "Brief on Dispositive Rule 56 Motions for Summary Judgment," which the Court deems both a response to the defendants' brief and also Gutridge's own cross-motion for summary judgment. In this brief, Gutridge seeks summary judgment on the issue of whether lifting in excess of forty-five pounds is an essential element of the service technician position at ComputerLand.

For the reasons set forth in this memorandum, the plaintiff's cross-motion for summary judgment is denied and the defendants' motion for summary judgment is granted.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R. Civ. P. 56(c). Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order for the moving party to prevail, it must demonstrate to the Court that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. A material issue is genuine if it has any real basis in the

record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

On a motion for summary judgment, the Court must view all evidence and inferences in the light most favorable to the nonmoving party, *Anderson*, 477 U.S. at 250, and in discrimination cases, the Court should be particularly deferential to the non-moving party. *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996); *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). However, the nonmoving party may not rest on the mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324. And if the plaintiff cannot support each essential element of his claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders other facts immaterial. *Id.* at 322-23.

These rules apply even when, as here, the parties file cross-motions for summary judgment. "When presented with cross-motions for summary judgment, '[t]he court must rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance wit the Rule 56 standard.' " *Towne Management Corp. v. Hartford Accident & Indem. Co.*, 627 F. Supp. 170, 172 (D. Md. 1985) (quoting Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2720). *See also Federal Savings & Loan Ins. Corp. v. Heidrick*, 774 F. Supp. 352 (D. Md. 1991); *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

II. FACTS

Starting with the defendants' motion with summary judgment, the Court reviews the evidence and inferences in the light most favorable to plaintiff Gutridge. The defendant Midland Computer, Inc., d/b/a ComputerLand (ComputerLand), is a corporate reseller concentrating primarily on the sale and service of computer needs to commercial customers throughout eastern Nebraska and western Iowa. The company employed approximately seventy employees from 1990-1995. Its president is defendant Wayne Clure.

In October 1990, ComputerLand hired Gavin Gutridge as a service technician. The primary function of a ComputerLand computer service technician is the configuration, set up, and replacement of computers and computer-related components. Gutridge worked on a seven-member team who would generally report to the company office each day before being dispatched on service calls. Gutridge says that his duties as a ComputerLand employee were to troubleshoot and repair microcomputers, terminals, printers, and related peripherals both at the company office ("the shop") and at customers' places of business ("on-site"). Gutridge says an ability to lift and move a certain amount of weight was never a qualification for or an essential function of the job in any published advertisement for the position of service technician.

While many service technicians did their set up and repair work on-site, Gutridge claims that he performed "most" of his service technician duties at the shop, even

before his March 1993 injury. Plaintiff's Brief on Dispositive Rule 56 Motions for Summary Judgment, at 3 ¶ 8. (In his affidavit, however, Gutridge says that he performed "many" of his service technician duties in the shop. Affidavit of Gavin Gutridge, at 2 ¶ 11.)

On March 16, 1993, while lifting a fifty-five pound computer monitor, Gutridge felt his left wrist snap. He began to experience pain and numbness in his wrist, hand, and fingers. Despite medical attention, this pain and numbness persisted. Eventually, he began also to feel pain and numbness in his right wrist, hand, and fingers. On August 23, 1993, Gutridge underwent surgery on his left hand for carpal cubital tunnel syndrome; on September 27, 1993, he underwent the same surgery on his right hand. Gutridge returned to work after each surgery, but he depended on others to lift computer components and equipment for him.

Following surgery, Gutridge began developing a weakness in his right hand that caused his grip strength to deteriorate and made it difficult for him to perform tasks such as opening jars. On February 21, 1994, he had surgery on his right elbow, hoping to get relief from the persistent pain and weakness in his right hand that made it impossible for him to write more than ten minutes at a time and only then with a large foam grip. More surgery on the right elbow followed on August 22, 1994. On November 15, 1994, Gutridge had surgery on his upper right arm to alleviate his pain. As a result of the injury and these surgeries, plaintiff's doctor restricted his lifting. From Spring 1993 until he was terminated on June 22, 1995, ComputerLand assigned Gutridge to light duty in the shop.

On June 19, 1995, Gutridge's doctor released him to return to light duty. Gutridge was restricted, however, to lifting no more than forty-five pounds 5% of the work day, thirty-five pounds 33% of the work day, and twenty pounds consistently. These restrictions created a problem for both Gutridge and ComputerLand since many computer components weigh more than forty-five pounds. Most pieces weigh considerably more than thirty-five pounds, as shown by the defendants' copies of selected product specification sheets. Evidence and Evidence Index for Defendants' Motion for Summary Judgment, Ex. 2. Gutridge claims that when service technicians needed to move computer equipment or other objects in the shop weighing more than forty-five pounds, they would get help from another service technician, if available; if the service technician were working on-site, the technician could seek help from a customer's office personnel.

Claiming that it did not have any positions for "light duty" computer technicians with Gutridge's medical restrictions, ComputerLand finally terminated Gutridge on or about June 22, 1995, even though his "abilities as a service technician are above average." Defendants' Brief in Support of Motion for Summary Judgment, at 3 ¶ 15. Both parties agree that the termination was based solely on Gutridge's doctor's written restrictions of his physical capabilities and restrictions. Gutridge says that his medical problems keep him from doing other manual tasks beyond lifting computer components, such as moving furniture, tilling the garden, mowing the lawn, and driving his truck with manual transmission and no power

steering. Affidavit of Gavin Gutridge, at 5 ¶ 32; Deposition of Gavin Gutridge at 41-43.

Gutridge contests the termination because he claims that he is able to perform the essential job functions of a ComputerLand computer service technician so long as others can help with any necessary lifting. He also claims that because he is able to repair equipment so quickly, he more than makes up for the time others would spend assisting him with lifting. He asserts that ComputerLand had enough work in the shop to keep him busy, but that even if he were assigned to go on-site, not all jobs would require him to lift or move equipment exceeding his medical restrictions. Two service technicians armed with carts, dollies, and four-wheelers could handle other on-site jobs involving lifting and moving equipment exceeding his medical restrictions. Affidavit of Gavin Gutridge, at 4-5, ¶ 31.

Turning then to the plaintiff's motion for summary judgment, the Court must review this same evidence and the inferences it creates in the light most favorable to defendants Clure and ComputerLand. The defendants do not dispute the basic facts concerning plaintiff's injury or medical treatment. They do claim, however, that service technicians routinely are required to lift objects weighing more than Gutridge is permitted to lift under his medical restrictions. These objects include computer components, computer-related equipment, and office furniture such as desks, shelves, or chairs. Further, Gutridge knew that his light duty assignment, which lasted from the spring of 1993 until the date of his termination, was temporary. Evidence & Evidence Index for Defendants' Motion for

Summary Judgment, Ex. C. Deposition of Gavin Gutridge, at 14, 30, 45. No other service technicians were assigned in-shop duty during this period Gutridge when was on temporary light duty.

Defendants state that Gutridge's medical restrictions on lifting make him unable to perform an essential function of ComputerLand service technicians since ComputerLand service technicians routinely must lift, by themselves, components weighing more than forty-five pounds. While none of the newspaper ads ComputerLand ran for the service technician position included a lifting requirement, Evidence & Evidence Index for Plaintiff's Motion for Summary Judgment, Ex. 5, Answers to Plaintiff's First Set of Interrogatories, Interrogatory No. 32, the defendants prepared for Gutridge's physicians and physical therapists a "job summary" for computer service technicians. This summary requires, among other things, that a service technician have an "ability to lift 50 to 75 pounds" and an "ability to transport equipment between customer site and shop and from shop to customer site." Evidence & Evidence Index for Defendants' Motion for Summary Judgment, Ex. B. Moreover, the personnel director for ComputerLand stated that service technicians never worked as teams and, further, that since 1991, work on a customer's computer would be done in-shop only if it could not be done on-site. Affidavit of Robert Keefe, at 2 ¶ 6; Supplemental Affidavit of Robert Keefe, at 1 ¶ 3. The personnel director also points out that asking customers to assist technicians in lifting computer equipment "was not acceptable nor was it the standard of practice." *Id.* Thus Gutridge could not perform the lifting parts of his job duties by working with another technician

or by enlisting the help of customers. *See* Evidence & Evidence Index for Defendants' Motion for Summary Judgment, Ex. C, Affidavit of Gavin Gutridge at 55-56.

ComputerLand states that Gutridge may be able to perform duties as a service technician in other companies that do not require him to work at customers' places of business. In fact, Gutridge is currently employed as a computer technician by Service Dimensions, Inc., performing duties similar to those he performed for ComputerLand, presumably minus the lifting. He also had another service technician job prior to his position at Service Dimensions. Evidence & Evidence Index for Defendants' Motion for Summary Judgment, Ex. C, Affidavit of Gavin Gutridge, at 5-8.

Defendants insist that they terminated Gutridge only because his physical capabilities and restrictions made him unable to perform the service technician job at ComputerLand. No reasonable accommodations could be made that would allow Gutridge to perform the functions of his job short of having others perform essential job functions for him. Gutridge was not terminated as a result of any disability or perceived disability.

III. DISCUSSION

The ADA prohibits discrimination against "a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. § 12112(a). A "qualfiied individual with a disability" is a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

To state a cause of action under the ADA, an employee must show that he or she has a disability as defined by 42 U.S.C. § 12102(2); that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he or she has suffered adverse employment action because of the disability. *Robinson v. Neodata Services, Inc.*, 94 F.3d 499, 501 (8th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995). Thus, "[t]o survive a defendant's summary judgment motion, an ADA plaintiff must meet the threshold burden of establishing that he is disabled under the statute." *Howard v. Navistar Internat'l*, 904 F. Supp. 922, 927 (E.D. Wis. 1995) (citing *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995)).

A disability is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [the employee]; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Under the ADA regulations, "major life activities" are "functions such as caring for oneself, performing manual tasks, . . . and working." 29 C.F.R. § 1630.2(1). If an individual's ability to work is substantially limited or regarded as substantially limited by an impairment, the individual is "disabled" within the meaning of the ADA.

"Substantially limits" with respect to the major life activity of working means.

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(1). "Working" is thus not an expansive term that means working at the particular job the plaintiff wants. "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) (quoting *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994). The factors a court may consider in determining whether an individual is substantially limited in a major life activity include the nature and severity of the impairment, its duration or expected duration, and its actual or expected long-term impact. 29 C.F.R. § 1630.2(j). Additionally, in determining whether an individual is substantially limited in the major life activity of working, a court may consider three other factors:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of the impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

> (C) The job from which the individual has been disqualified because of the impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii).

Many courts do not consider lifting restrictions such as Gutridge's to be substantial limits on employee's major life activities. In one case, the court held that a twenty-five pound lifting restriction, a much greater restriction than Gutridge's, did not substantially limit an employee's overall employment opportunities. *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996). Likewise, a mail processing clerk who suffered an injury to her arm that resulted in a 6% impairment rating and permanent lifting restrictions was also held not to be disabled "[b]ecause [she] failed to establish that her physical impairment substantially limits one or more of her major life activities, or that she otherwise fit within the definition of disability. . . . " *Robinson v. Neodata Services, Inc.*, 94 F.3d 499, 502 (8th Cir. 1996).

A 24-year-old college graduate working on her teaching certificate suffered carpal tunnel syndrome after working on a welding production line. She was then restricted to lifting from ten to twelve pounds regularly and twenty pounds occasionally and was to avoid pushing or pulling or the use of vibrating tools. The court said that the limit on her performance of repetitive-motion factory work did not "significantly restrict her ability to

perform either a class of jobs or a broad range of jobs in various classes as compared to average person having comparable training, skills and abilities." *McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 373 (6th Cir. 1997).

Similarly, a meat cutter in a packing plant with carpal tunnel syndrome was restricted to "light duty – no work with meat products – no work in cold environment – lifting 10 lbs. frequently 20 pounds maximum." *Wooten v. Farmland Foods*, 58 F.3d 382, 384 (8th Cir. 1995). The trial court granted the employer summary judgment because the employee failed to present evidence that his impairment substantially affected his ability to work. The court said that his impairments, "whether regarded as permanent or temporary, only appeared to prevent him from performing a narrow range of meat-packing jobs." *Id.* at 386. *See also Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) ("*Like the Eighth Circuit, we hold, as a matter of law,*" that a twenty-five pound lifting restriction is not a "significant restriction on one's ability to lift, work, or perform any other major life activity.") (emphasis added); *Terrell v. USAir*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996) (employee with carpal tunnel syndrome not disabled within meaning of the ADA because she only offered evidence about the nature and severity of her impairment, its duration, and its impact – not about "the number and types of jobs utilizing similar training knowledge, skills or abilities, within [this] geographic area."); and *McCollugh v. Atlanta Beverage Co.*, 929 F. Supp. 1489, 1497 (N.D. Ga. 1996) ("[I]t arguably turns the very purpose of the ADA on its head to require that an employer give a job preference, over all other employees or applicants, to an individual who, while

having an impairment [lifting] that affects his ability to perform one kind of job, is not unable to perform a range of other comparable jobs not affected by the impairment."). For other cases finding that lifting restrictions do not substantially limit major life activities, see the lists in *Vaughan v. Harvard Industries, Inc.*, 926 F. Supp. 1340, 1346 (W.D. Tenn. 1996); *Terrell v. USAir*, 955 F. Supp. 1448, 1452 (M.D. Fla. 1996) (carpal tunnel syndrome cases).

The courts that do find a jury question on whether lifting restrictions are substantial limits on an employee's life activities generally have before them plaintiffs either with far worse impairments than Gutridge or with limited education, training or employment history. *See, e.g., Smith v. Kitterman, Inc.*, 897 F. Supp. 423 (W.D. Mo. 1995) (42-year-old employee with carpal tunnel syndrome who had been with employer for twenty-five years in only two jobs); *Garza v. Abbott Laboratories*, 940 F. Supp. 1227 (N.D. Ill. 1996) (plaintiff with condition that prevented her from typing survived motion for summary judgment because she produced evidence that she was unable to find employment after termination due to her condition).

Plaintiff's brief cites several cases, but they do not deal directly with ADA "disabilities" caused by carpal tunnel syndrome. Instead, plaintiff cites a variety of cases decided under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797 (1996), which defines "handicapped" in substantially the same manner as the ADA defines "disabled" and which is implemented with the identical EEOC regulations. While Rehabilitation Act cases are instructive for analysis, *Wooten*, 58 F.3d at 385, n.2, the cases plaintiff cites do little to overcome the weight of ADA-related authority in the defendants' favor.

We find that Gutridge is not "disabled" within the meaning of 42 U.S.C. § 12102(2)(a) of the ADA because his permanent lifting restriction of forth-five pounds does not substantially limit his major life activities. While his carpal tunnel syndrome has left him unable to perform the particular job of a ComputerLand service technician, he is still clearly able to function as a computer repair technician for other employers in the same geographical area who do not require lifting as part of the job duties. Indeed, after Gutridge left ComputerLand, he found a job as a computer service technician with one company and is currently employed by yet another company as a computer service technician. Gutridge has failed to present "sufficient evidence to establish that the nature, duration, and long-term impact of his medical problems caused him to be substantially limited in a major life activity." *Aucutt*, 85 F.3d at 1319.

We accordingly grant the defendant summary judgment on the threshold issue of whether Gutridge is a "disabled individual." Since Gutridge has failed to bring forth sufficient facts to raise a genuine issue about whether his major life activity of working has been substantially limited, we need not reach the other two elements of the cause of action. Because of our decision here, we do not reach the merits, if any, of Gutridge's claim under the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1126 (Reissue 1993).

VI. CONCLUSION

For the foregoing reasons, the Court finds that the defendants' motion for summary judgment should be

granted and the plaintiff's motion for summary judgment should be denied. Accordingly,

IT IS ORDERED that:

1. The defendants' motion for summary judgment (Filing No. 29) is granted; and

2. The plaintiff's motion for summary judgment (Filing No. 38) is denied.

DATED this 26 day of November, 1997.

BY THE COURT:

/s/ Joseph F. Bataillon
JOSEPH F. BATAILLON,
District Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GAVIN GUTRIDGE, Plaintiff, v. MIDLAND COMPUTER, INC., d/b/a COMPUTERLAND OF NEBRASKA a/k/a COMPUTERLAND; and WAYNE CLURE, as President of ComputerLand Individually, Defendants.	)	8:97CV3 **JUDGMENT**

In accordance with the memorandum opinion and order entered on this date, it is ordered that this action is dismissed with prejudice.

DATED this 26th day of November, 1997.

BY THE COURT:

/s/ Joseph F. Bataillon
JOSEPH F. BATAILLON,
District Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1189NEO	*	
	*	
Gavin Gutridge,	*	Appeal from the
Appellant,	*	United States
	*	District Court
vs.	*	for the
	*	
Wayne Clure, etc., et al.,	*	District of Nebraska
	*	
Appellee.	*	
	*	

The petition for rehearing filed by the appellant has been considered by the court and is denied.

December 11, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
APR 12 1999
CLERK

(2)

No. 98-1459

In The

Supreme Court of the United States

October Term, 1998

GAVIN GUTRIDGE,

Petitioner,

vs.

MIDLAND COMPUTER, INC., d/b/a COMPUTERLAND OF NEBRASKA, a/k/a COMPUTERLAND; and WAYNE CLURE as President of ComputerLand, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JEFF C. MILLER
Counsel of Record
DUNCAN A. YOUNG
YOUNG & WHITE
8742 Frederick Street
P.O. Box 241358
Omaha, NE 68124-5358
(402) 393-5600
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATUTES AND REGULATIONS INVOLVED

In addition to the statutes set forth in the Petition For Writ Of Certiorari, it is respectfully submitted that the following statutes and regulations are involved in this case:

29 C.F.R. § 1630.2(j)(2)

> The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(k)

> Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

STATEMENT OF THE CASE

The Respondents respectfully submit that the published opinion of the United States Court of Appeals for the Eighth Circuit accurately describes the course of proceedings below. Because the Petitioner's discussion of the facts fails to fully set forth the facts material to the consideration of the questions presented, the Respondents will provide such a thorough recitation of the facts.

1. Statement Of The Facts.

Midland Computer, Inc. is a Nebraska corporation which does business as ComputerLand of Nebraska and which is also known as ComputerLand. Since 1992, the business operations of ComputerLand have consisted of the selling of personal computers and related products and the providing of maintenance and support services therefor, directly to businesses. Prior to 1992, the business operations of ComputerLand consisted of retail sales of personal computers to home users and small businesses, but such retail operations were transitioned out by 1992 and ComputerLand no longer engages in such retail operations.

The computer equipment which ComputerLand sells directly to businesses consists of computers and all accessories such as monitors, servers, keyboards, printers, scanners, and battery backup systems. These various components to a complete computer system are of various sizes and weights. For example, servers weigh fifty pounds, monitors or displays weigh from thirty-one pounds up to eighty-six pounds, printers weigh forty-six pounds and more, and battery backup systems weigh from fifty pounds to more than one-hundred pounds. Seventeen inch monitors are the standard size monitor for ComputerLand's customers, and these seventeen inch monitors weigh between forty-eight and fifty-nine pounds. Some of these computer components have an "on-site 3-year warranty" and some have a "3-year; on-site 1st year" warranty.

Between 1990 and 1995, ComputerLand employed approximately ten to thirteen full-time and part-time service technicians. The duties of these service technicians were to install, repair, and service all of the computer

equipment sold to ComputerLand's customers. In performing these duties the service technicians were required to lift computer equipment, transport computer equipment between the customer site and ComputerLand's shop, and move objects at the customer site such as desks, shelves, and chairs. Mr. Gutridge agrees that ComputerLand's service technicians were required to lift computer equipment, that the lifting of computer equipment in excess of forty-five and fifty pounds was required, that the lifting of heavy equipment was required, that the lifting of equipment weighing fifty to seventy-five pounds was something that ComputerLand expected service technicians to do, and that the moving of equipment which weighed as much as one-hundred pounds while working alone at a customer site was also required.

In order to provide services to its customers, ComputerLand's service technicians are dispatched to the customer's site and ComputerLand's service technicians are all thus "outbound" service technicians. Each service technician functions independently of the other service technicians and they do not work as a team. All service work is to be performed at the customer's site if at all feasible, and service work is to be performed at ComputerLand's shop only when it cannot feasibly be accomplished at the customer's site. The performance of all service work at the customer's site is either pursuant to the "on-site" service warranties or for increased customer convenience.

ComputerLand does not have any "inbound" or "in-shop" service technician positions where the service technician just works on computer equipment at ComputerLand's shop. In the 1980s and into the early 1990s, the

majority of service work was performed in ComputerLand's shop, but this was when ComputerLand's business operations consisted of retail sales to home users and small businesses. Such retail operations were transitioned out by 1992 and ComputerLand no longer runs such retail operations or such in-shop service work. The percentage of ComputerLand's business which consists of a customer bringing in computer equipment for service work is very, very small and is less than one-quarter of one percent.

In the fall of 1990 ComputerLand hired Mr. Gutridge as an outbound service technician. While so employed and on March 16, 1993, Mr. Gutridge was lifting a fifty-five pound monitor when he heard his left wrist snap. Thereafter and through June 1995, Mr. Gutridge received medical treatment for left and right carpal tunnel syndrome and left and right cubital tunnel syndrome. Such medical treatment included five separate surgeries on Mr. Gutridge's left and right wrists and elbows, and it was the opinion of two physicians that Mr. Gutridge's injury and conditions were all due to occupational activity at ComputerLand and were thus covered under workers' compensation.

More specifically and with regard to Mr. Gutridge's conditions, his right carpal tunnel syndrome was diagnosed to be mild, his left carpal tunnel syndrome was diagnosed to be borderline, and his right cubital tunnel syndrome was also diagnosed to be mild. Furthermore, neurological and electromyographic examinations were normal and revealed no evidence of acute or chronic denervation, no evidence of a generalized neuropathic process, and no evidence of an ongoing neurologic injury.

Between March 1993 and June 1995, ComputerLand assigned Mr. Gutridge to light duty work as an in-shop service technician because of lifting restrictions placed on him by his treating physician. This assignment was temporary and Mr. Gutridge acknowledges such, and no other ComputerLand service technician other than Mr. Gutridge was assigned as an in-shop service technician. Mr. Gutridge's lifting restrictions varied during this time based on where he was with his medical treatment, and Mr. Gutridge worked as an in-shop service technician by using the assistance of other personnel when lifting. ComputerLand was cooperative and supportive regarding Mr. Gutridge's temporary restrictions.

On June 19, 1995, Mr. Gutridge had reached maximum medical improvement and his treating physician issued a written release for Mr. Gutridge to return to light duty work with this permanent restriction: "May lift 45 lb 5% of work day, 35 lb 33% of time 20 lb 20% of time, 10 lb constantly (permanent)." Mr. Gutridge gave this written release to ComputerLand's personnel director, Robert Keefe, and Mr. Keefe advised Mr. Gutridge not to exceed any of his permanent lifting restrictions.

Mr. Keefe delivered the written release to ComputerLand's president, Wayne Clure, and the two of them then discussed Mr. Gutridge's future employment. More specifically, Mr. Keefe and Mr. Clure discussed the duties of ComputerLand's service technicians, whether Mr. Gutridge could perform the duties of a service technician with his permanent lifting restriction, the reasonable accommodations that could be made, the other positions available, and the nature of ComputerLand's business. Based on Mr. Gutridge's permanent lifting restriction, it was decided that Mr. Gutridge was not able to perform

the duties of a ComputerLand service technician, that there were no other positions available for Mr. Gutridge, that there were no reasonable accommodations that could be made, and that Mr. Gutridge's employment with ComputerLand would be terminated.

On June 22, 1995, ComputerLand gave Mr. Gutridge a letter of termination. The body of this termination letter states:

> We have been hopeful for some time now that your physical problems were temporary and that through rehabilitation you would be able to resume your job without the assistance of another employee to handle the lifting requirements.
>
> We have been informed that your rehabilitation program has ended and that the medical restrictions as identified by Dr. David Clough are now rated as permanent. That condition unfortunately prevents you from being able to fully accomplish the tasks necessary to perform your job functions.
>
> We regret to inform you that we will no longer retain your services under these conditions. Your employment is being terminated effective June 23, 1995. We have been told that you will be eligible for retraining under workman's compensation and hope that you will take advantage of this opportunity.
>
> You have been a valued employee and we sincerely regret that we do not have a position available that can utilize your skills without creating a hardship for the company.
>
> Thank you for the efforts you have given this company over the past four and a half years. We wish you the best.

Mr. Clure and Mr. Keefe did not believe that Mr. Gutridge was disabled and did not perceive Mr. Gutridge to be disabled, and Mr. Gutridge was not terminated because of a disability or any perceived disability. Mr. Gutridge does not know of any information or evidence which would support an allegation that ComputerLand was trying to get rid of him for any reasons other than what is stated in the termination letter.

Mr. Gutridge's abilities as a computer service technician are above average and his permanent lifting restriction does not limit his ability to perform the job of a service technician for other employers which do not require on-site customer service. In fact on July 17, 1995, which is just three and a half weeks after his termination from ComputerLand, Mr. Gutridge was employed as a computer service technician by another company in Omaha. This other company was a vendor of on-site and in-shop computer repairs, and Mr. Gutridge was so employed by this other company through May 1997. During such employment Mr. Gutridge was promoted to lead service technician and his annual salary was $27,500.00.

This other employer closed its commercial division in May 1997 and Mr. Gutridge then started employment as a computer service technician for yet another company in Omaha. The period of unemployment between these two companies was just two weeks, and Mr. Gutridge never applied for employment any place else because he had been guaranteed employment with the second company. The business operations of the second company consist of retail in-shop and on-site computer repairs. Mr. Gutridge's annual salary at this second company is $26,000.00, and Mr. Gutridge is able to perform all functions of this job.

As agreed to in the Application For Approval Of Lump Sum Settlement Agreement which was filed with the Nebraska Workers' Compensation Court in October 1995, after his termination from ComputerLand Mr. Gutridge returned to other employment on July 17, 1995 and he "possesses sufficient present job skills to enable him to obtain and retain employment at a wage equal to or in excess of his wage with [ComputerLand]. . . . " Furthermore, in the Application For Approval Of Lump Sum Settlement Agreement, Mr. Gutridge waived any rights he may have had to rehabilitation services pursuant to the Nebraska Workers' Compensation laws.

2. The Petition Misrepresents The Decision Of The United States District Court For The District Of Nebraska.

As was alleged in Mr. Gutridge's Amended Complaint, it was the permanent lifting restriction which supposedly constituted a disability under 42 U.S.C. § 12102(2). Likewise, Mr. Gutridge twice testified in his deposition that his disability was the permanent lifting restriction, and Mr. Gutridge further testified that he did not know of any information or evidence which would support an allegation that ComputerLand was trying to get rid of him for any reasons other than what was stated in ComputerLand's termination letter.

The crux of the arguments that were presented to the District Court therefore addressed whether there were genuine issues of material fact as to whether Mr. Gutridge's lifting restriction constituted a physical impairment which substantially limited major life activities. Mr.

Gutridge did make a secondary argument that his temporary course of treatment and period of recovery constituted a record of such an impairment, but the District Court's written decision properly focused on the crux of the parties' arguments, and by deciding that Mr. Gutridge was not a disabled individual the District Court resolved Mr. Gutridge's record of impairment argument against him. Similarly, by deciding that Mr. Gutridge was not a disabled individual, the District Court resolved that all major life activities, including the performance of manual tasks, were not substantially limited. The assertions that the District Court did not address and therefore left unresolved, the issues of a record of impairment and whether Mr. Gutridge was substantially limited in the performance of manual tasks, thus misrepresent the District Court's decision.

3. The Petition Misrepresents The Decision Of The United States Court Of Appeals For The Eighth Circuit.

On appeal Mr. Gutridge's arguments focused on whether he had a record of impairment concerning the major life activities of working, lifting, and performing manual tasks. The Eighth Circuit ruled, however, that Mr. Gutridge failed to present a genuine issue of fact that one or more of his major life activities were substantially limited, and the Eighth Circuit also ruled that Mr. Gutridge failed to present a genuine issue of fact that he is disabled within the meaning of the ADA. In so ruling the Eighth Circuit resolved all of Mr. Gutridge's arguments against him. Mr. Gutridge's assertions that the Eighth Circuit overlooked whether the major life activity of performing manual tasks was substantially limited, and that

the Eighth Circuit failed to consider his impairment's cumulative effect on all major life activities, are misrepresentations of the Eighth Circuit's decision.

REASONS FOR DENYING THE WRIT

1. The Decisions Below Resolved All Arguments Against Mr. Gutridge.

Mr. Gutridge's Petition makes several assertions that the courts below either overlooked or failed to address or consider some of his arguments. As previously discussed, however, by deciding that there were no genuine issues of fact that Mr. Gutridge was not disabled under the ADA, the courts below resolved all of Mr. Gutridge's arguments against him. Mr. Gutridge's assertions about overlooked arguments are misrepresentations, and such assertions are therefore insufficient grounds for granting certiorari.

2. The Decisions Below Properly Interpreted And Applied The Americans With Disabilities Act.

The thrust of Mr. Gutridge's Petition is simply that the decisions of the courts below are erroneous. What the courts below determined, was that there was an absence of evidence establishing a *prima facie* case on the essential element of being disabled under the ADA, and it is respectfully submitted that in so acting the courts below properly ruled and properly interpreted and applied the ADA. Mr. Gutridge therefore fails to present any compelling reasons for granting a writ of certiorari.

With regard to what constitutes a disability, the ADA provides that "[t]he term 'disability' means, with respect to an individual – (A) a physical or mental impairment

that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §§ 12102(2)(A)-(C). The key terms in this definition of disability, are in turn defined in regulations issued by the Equal Employment Opportunity Commission. As applicable here, "physical impairment" is defined in part as any physiological disorder or condition affecting the neurological or musculoskeletal systems. 29 C.F.R. § 1630.2(h)(1). "Substantially limits" is defined as meaning:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. §§ 1630.2(j)(1)(i) and (ii). The term "major life activities" is defined to mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The E.E.O.C.'s Interpretive Guidance to the regulations further provides that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(i). And the term "has a record of such an impairment" is defined as meaning "has a history of, or has

been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k).

When determining whether an individual is substantially limited in a major life activity, the regulations further provide that there be consideration of the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. §§ 1630.2(j)(2)(i)-(iii).

Finally, as to whether the major life activity of working is substantially limited, the regulations provide:

> (3) With respect to the major life activity of *working* –
>
> (i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
>
> (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills

> or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. §§ 1630.2(j)(3)(i)(ii)(A)-(C).

ACTUAL DISABILITY

The crux of the arguments presented to the District Court concerned whether there were genuine issues of material fact as to whether Mr. Gutridge had an actual disability under 42 U.S.C. § 12102(2)(A), which is there defined as a physical impairment that substantially limits major life activities. The District Court decided that Mr. Gutridge had failed to bring forth sufficient facts to raise a genuine issue, and that Mr. Gutridge was thus not disabled within the meaning of 42 U.S.C. § 12102(2)(A) because Mr. Gutridge's lifting restriction did not substantially limit his major life activities. It is respectfully submitted that summary judgment was properly granted and affirmed because of the absence of evidence establishing a *prima facie* case on this element of Mr. Gutridge's ADA claim, and that the courts below thus properly interpreted and applied the ADA.

First, as alleged in Mr. Gutridge's Complaint, and as Mr. Gutridge himself testified, his disability is the written lifting restriction which was issued by his physician in

June 1995. This lifting restriction provides that Mr. Gutridge may lift 45 lbs. 5% of the work day, 35 lbs. 33% of the time, 20 lbs. 20% of the time, and 10 lbs. constantly. But as the circuit courts have held, such a written lifting restriction is not an impairment which substantially limits major life activities and is not therefore a disability under the ADA, and an employer's actions based on a physician's written restrictions do not violate the ADA.

For example, in *Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201 (8th Cir. 1997), the plaintiff underwent a cervical fusion and some years later the plaintiff's physician recommended a twenty-five pound lifting restriction. *Id.* at 1204. Years later the plaintiff was terminated and she asserted that her physical impairment " 'affects such activities as performing manual tasks, . . . lifting, and working." *Id.* at 1207. In affirming summary judgment for the defendant-employer it was held: "While lifting is noted under the regulations as a major life activity, a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA." *Id.*

A flight attendant was the plaintiff in *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1116 (5th Cir. 1998), and after an on-the-job neck injury which required surgery, the plaintiff reinjured her neck while working and had surgery again. *Id.* Following the second surgery the plaintiff was placed on sick leave for a five year term pursuant to the collective bargaining agreement. *Id.* After three years the plaintiff sought reinstatement, but reinstatement was denied because the plaintiff could only lift forty-five pounds occasionally and twenty-five pounds frequently. *Id.* Summary judgment against the plaintiff's ADA claim was affirmed on the basis that the lifting

restriction was not a substantial limitation on a major life activity. *Id.* at 1120.

In *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613 (8th Cir. 1997), the plaintiff had a permanent medical restriction which included "a lift limit of ten pounds frequently and twenty pounds occasionally." *Id.* at 615. The plaintiff's disability discrimination claim was based on the Iowa Civil Rights Act and not the ADA, but in affirming summary judgment for the defendant-employer it was held that evidence that the impairment limits work-related activities such as lifting does not create a genuine issue regarding substantial limitations on other major life activities. *Id.* at 617.

The plaintiff in *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996), was hospitalized for several days and later returned to work with a doctor's release prohibiting the lifting of more than twenty-five pounds. *Id.* at 1314. The circuit court affirmed summary judgment for the defendant-employer and held that the lifting restriction, without more, did not constitute an impairment that substantially limits major life activities under 42 U.S.C. § 12102(2)(A). *Aucutt*, 85 F.3d at 1319.

Summary judgment for the defendant-employer was likewise affirmed in *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1844, 137 L. Ed. 2d 1048 (1997). The plaintiff in that case had a restriction from lifting more than twenty-five pounds, and citing to the decision in *Aucutt* the Fourth Circuit held: "Like the Eighth Circuit, we hold, as a matter of law, that a twenty-five pound lifting limitation – particularly when compared to an

average person's abilities – does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity." *Williams*, 101 F.3d at 349.

The case of *Gerdes v. Swift-Eckrich, Inc.*, 125 F.3d 634 (8th Cir. 1997), involved a plaintiff who had undergone two heart surgeries and who had returned to work with medical restrictions, in part, against excessive lifting. *Id.* at 635. The defendant-employer based its conduct on the plaintiff's actual medical restrictions, *id.* at 637, and the circuit court affirmed the granting of summary judgment for the employer because the plaintiff failed to show that he was disabled as defined by the ADA. *Id.* at 637-38.

In *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997), the plaintiff injured his back at work, but he returned to work for several months and then he took an extended leave for recuperation. *Id.* at 195. After a couple of months the plaintiff was cleared by his doctor to return to work with a twenty pound lifting restriction. *Id.* Summary judgment for the employer was affirmed because the plaintiff did not have a significant restriction on the ability to perform any major life activity. *Id.* at 200.

A diagnosis of bilateral carpal tunnel syndrome and a doctor's twenty pound lifting restriction were involved in *Wooten v. Farmland Foods*, 58 F.3d 382, 384 (8th Cir. 1995). Like the case at bar the termination decision of the defendant-employer in *Wooten* was based on the physical restrictions imposed by the doctor and the unavailability of other jobs which could accommodate the restrictions. *Id.* at 386. The circuit court concluded that there was no material dispute as to whether the plaintiff was disabled within the meaning of the ADA and summary judgment for the defendant-employer was thus affirmed. *Id.*

The foregoing authorities establish that Mr. Gutridge's written lifting restriction is not, without more, an impairment which substantially limits any major life activities and is thus not an actual disability within the meaning of 42 U.S.C. § 12102(2)(A), and that Computer-Land's termination of Mr. Gutridge's employment based on the lifting restriction and Mr. Gutridge's inability to perform the essential job functions, plus the unavailability of other positions which could accommodate the restriction, does not violate the ADA. The courts below thus properly interpreted and applied the ADA, and summary judgment was therefore properly granted and affirmed because of the absence of evidence establishing a *prima facie* case on this element of Mr. Gutridge's ADA claim.

RECORD OF IMPAIRMENT

The almost exclusive focus of Mr. Gutridge's arguments on appeal, was whether he has a record of an impairment as provided in 42 U.S.C. § 12102(B). Based on his course of treatment and the attendant medical records, Mr. Gutridge asserts that he is entitled to summary judgment on the essential element of being a disabled individual within the meaning of the ADA because he allegedly has such a record of an impairment. A number of fatal defects exist, however, with Mr. Gutridge's assertion.

First, even assuming arguendo that Mr. Gutridge's course of treatment and the attendant medical records constitute a record of an impairment, there is an absence of evidence to show that Mr. Gutridge was terminated because of any such record of impairment. The ADA prohibits the discriminatory discharge of a qualified

employee with a disability "because of" the disability. 42 U.S.C. § 12112(a). Stated in a different vernacular and with regard to having a record of an impairment, the ADA prohibits an employer from discriminatorily discharging a qualified employee with a record of an impairment "because of" that employee's record of an impairment. As further explained in the E.E.O.C.'s Interpretive Guidance, the intent of the record of impairment provision is to ensure that employees are not discriminated against "because of" a history of a disability and that employees are not discriminated against "because" they have been misclassified as disabled, and this provision "is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment." 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(k).

Here, however, there is an absence of evidence that ComputerLand terminated Mr. Gutridge "because of" his course of treatment or "because of" the attendant medical records. Additionally, there is an absence of evidence that ComputerLand "relied on" the course of treatment or the attendant medical records when deciding to terminate Mr. Gutridge. Instead, the unrefuted evidence is that the individuals at ComputerLand did not believe or perceive Mr. Gutridge to be disabled, that Mr. Gutridge was not terminated because of a disability or any perceived disability, that Mr. Gutridge's lifting restriction was not believed to limit his ability to perform the job of a service technician for other companies which do not require on-site customer service, and that Mr. Gutridge's employment was terminated in June 1995 because he was not

then able to perform the duties of a ComputerLand service technician under his recently imposed permanent lifting restriction and also because ComputerLand did not have a service technician position which could accommodate Mr. Gutridge's restrictions. Mr. Gutridge himself twice testified that his disability was the permanent lifting restriction, and Mr. Gutridge further testified that he does not know of any information or evidence which would support an allegation that ComputerLand was trying to get rid of him for any reasons other than what is stated in ComputerLand's termination letter. No evidence therefore exists that "because of" Mr. Gutridge's past course of treatment and the attendant medical records, ComputerLand decided to terminate his employment.

Mr. Gutridge in fact fully acknowledges that he was not terminated because of any supposed record of impairment, for in both his Complaint and his Petition herein it is stated that ComputerLand terminated his employment "based upon his permanent lifting restriction." (Petition For Writ Of Certiorari at 3.) This is thus not a neatly tailored case wherein this Court could render a narrow and focused decision on the ADA's "record of impairment" provision. On the contrary, it is respectfully submitted that the Question Presented For Review would not be reached if a writ of certiorari was granted, because there is no genuine issue of material fact that Mr. Gutridge was not terminated because of any record of an impairment and the Eighth Circuit's decision would have to be affirmed on this basis.

Second, the record of an impairment which is required by the ADA is a history of or a misclassification as having an impairment which substantially limits a

major life activity. 42 U.S.C. §§ 12102(2)(A) and (B); 29 C.F.R. § 1630.2(k). In other words, it must be a record of a disability that satisfies the ADA. *Land v. Baptist Medical Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645 (2d Cir. 1998); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1820, 137 L. Ed. 2d 1028 (1997). Temporary medical conditions, however, are not a disability, *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 199 (4th Cir. 1997), and temporary impairments with no long-term or permanent impact are also usually not a disability. 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(j). Likewise, temporary impairments while recovering and recuperating from an injury or surgery are not disabilities under the ADA. *Sanders v. Arneson Prod., Inc.*, 91 F.3d 1351, 1353-54 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1247, 137 L. Ed. 2d 392 (1997); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997); *McDonald v. Commonwealth of Pennsylvania*, 62 F.3d 92, 95-96 (3d Cir. 1995). Thus, the events concerning temporary medical conditions and temporary impairments while recovering and recuperating from an injury or surgery do not constitute a record or history of a disability, and if the alleged impairment is not a disability, then there necessarily is likewise no record or history of a disability. *Land*, 164 F.3d at 425; *Colwell*, 158 F.3d at 645; *Sherrod*, 132 F.3d at 1121; *Robinson*, 101 F.3d at 37.

Here, Mr. Gutridge is not disabled under the ADA because his permanent lifting restriction is not an impairment which substantially limits any major life activities, and therefore the temporary course of treatment and the

period of recovery which preceded the resulting permanent lifting restriction are likewise not a record of an impairment that substantially limits major life activities. Mr. Gutridge does not have a history of a permanent lifting restriction which substantially limits major life activities, and there is also no evidence of any record wherein Mr. Gutridge was misclassified as having a permanent lifting restriction which substantially limits major life activities. Mr. Gutridge continued to work for ComputerLand during his temporary course of treatment and period of recovery, although it was in a temporary light duty position as an in-shop service technician and pursuant to temporary lifting restrictions, and there is no evidence that any other major life activities were substantially limited during Mr. Gutridge's temporary course of treatment and period of recovery. A temporary course of treatment and period of recovery which do not result in an impairment which substantially limits major life activities and during which temporary period the employee continues employment and is not otherwise substantially limited in performing any other major life activities, do not as a matter of law constitute a record of impairment which substantially limits major life activities. The Eighth Circuit's decision correctly resolved Mr. Gutridge's record of an impairment argument against him and in so doing the Eighth Circuit properly interpreted and applied the ADA and the foregoing authorities. Mr. Gutridge thus incorrectly asserts that the decisions of the courts below are erroneous, and no grounds therefore exist for granting certiorari on such supposed basis.

3. There Are No Conflicting Decisions.

Mr. Gutridge asserts that the decisions of the courts below conflict with the decisions in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998), and *Taylor v. U.S. Postal Serv.*, 946 F.2d 1214 (6th Cir. 1991). It is respectfully submitted, however, that no such conflict exists, and that no grounds therefore exist for granting certiorari on such supposed basis.

The plaintiff in *Arline* was an elementary school teacher who was hospitalized for tuberculosis in 1957. *Arline* at 276, 107 S. Ct. at 1125, 94 L. Ed. 2d at 314. The disease was in remission for the next twenty years, but in 1978 the plaintiff had two relapses and the school board thereafter terminated the plaintiff's employment because of the continued reoccurrences. *Id.* The plaintiff sued pursuant to the Rehabilitation Act, and the school board conceded that the plaintiff's hospitalization for tuberculosis in 1957 demonstrated that the plaintiff had a record of a physical impairment. *Id.* at 281, 107 S. Ct. at 1128, 94 L. Ed. 2d at 317. This Court held that the tuberculosis

> was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impairment" within the meaning of 29 U.S.C. § 706(7)(B)(ii), and is therefore a handicapped individual.

Arline at 281, 107 S. Ct. at 1127, 94 L. Ed. 2d at 317. No factual details about the hospitalization are provided however.

Based on such language, plaintiffs have been asserting that *Arline* establishes that their hospitalizations constitute records of substantially limiting impairments, but the circuit courts have consistently and properly rejected such a reading of *Arline*. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645-46 (2d Cir. 1998); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 871, 139 L. Ed. 2d 768 (1998); *Demming v. Housing and Redevelopment Auth. of Duluth*, 66 F.3d 950, 955 (8th Cir. 1995); and *Taylor v. U.S. Postal Serv.*, 946 F.2d 1214, 1217 (6th Cir. 1991). The reasoning of the circuit courts for so rejecting such a reading of *Arline*, is best set forth in *Burch*, 119 F.3d at 317:

> The quoted language from *Arline* cannot be construed to obviate the requirement, explicit in the ADA and its implementing regulations, that purported conditions be examined to ascertain whether a specific condition substantially limited a major life activity. The ADA requires an individualized inquiry beyond the mere existence of a hospital stay. Although the Court in *Arline* noted that the plaintiff's hospitalization established a *record* of impairment, the defendant had conceded that her acute tuberculosis had been substantially limiting. Indeed, the defendant's position in *Arline* was not that the plaintiff was not "handicapped," but rather that her contagious disease – tuberculosis – was a threat to the health of others (and therefore precluded liability for termination on that basis). To

> accept Burch's reading would work a presumption that any condition requiring temporary hospitalization is disabling – a presumption that runs counter to the very goal of the ADA.

The Eighth Circuit's decision herein is consistent with the foregoing reasoning and is consistent with the other circuit courts' proper interpretations of *Arline*. The Eighth Circuit's decision herein therefore does not conflict with the decisions in *Arline* or *Taylor*, and Mr. Gutridge's assertion to the contrary is erroneous and is erroneously based on his own misinterpretation of *Arline*.

The Eighth Circuit's decision also does not conflict with the decision in *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998). The plaintiff in *Aldrich* was an assembly worker who developed pain in his right hand and difficulty using hand tools. *Id.* at 1267. He could not return to work and he was put on a medical leave of absence. *Id.* He was later released to return to limited work but there was no work that he could do within his medical restrictions, so he continued on medical leave. *Id.* The medical evaluations thereafter became less optimistic, and his condition later became permanent, severe, and substantially limiting. *Id.* at 1270. A decision to lay off the plaintiff was made a week before a permanent partial disability rating was issued. *Id.* at 1267. The circuit court held that it was error to rule that the plaintiff as a matter of law could not be disabled until his permanent disability rating was issued. *Id.* at 1271.

Here, as alleged in his Complaint and as Mr. Gutridge twice testified, it was the permanent lifting restriction and not the preceding temporary course of treatment and period of recovery, which supposedly constituted his disability. Also, unlike in *Aldrich*, there is no evidence

here that during the temporary course of treatment and period of recovery, that Mr. Gutridge's impairment ever was severe or substantially limiting. Instead, Mr. Gutridge continued to work full time but pursuant to temporary restrictions, and the medical evaluations were that Mr. Gutridge's conditions were mild and borderline and that there was no evidence of acute or chronic denervation or of a generalized neuropathic process or of an ongoing neurologic injury. Mr. Gutridge's condition did not result in an impairment which substantially limits any major life activities and, unlike in *Aldrich*, Mr. Gutridge's temporary conditions during his course of treatment and period of recovery prior to the issuance of permanent lifting restrictions, also did not involve impairments which substantially limited any major life activities.

The Eighth Circuit's decision is respectfully submitted to not be contrary to the decision in *Aldrich*, and no grounds thus exist for granting certiorari on such supposed basis.

4. The Decisions Below Are Supported On Other Grounds.

Other grounds support the granting and affirmance of summary judgment, and based on these other grounds it is respectfully submitted that the Question Presented For Review would not be reached if a writ of certiorari was granted because affirmance would be required on the basis of these other grounds.

QUALIFIED INDIVIDUAL

The ADA only applies to a "qualified individual," which is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. . . . " 42 U.S.C. § 12111(8). Assuming that Mr. Gutridge is an individual with a disability, it is respectfully asserted that summary judgment was properly granted and affirmed because there are no genuine issues that Mr. Gutridge could not perform the essential functions of a ComputerLand service technician either with or without reasonable accommodation.

First, as alleged in his Complaint and as Mr. Gutridge himself testified, his supposed disability is the permanent lifting restriction which is set forth in his written release to return to light duty work. This permanent lifting restriction limits Mr. Gutridge to lifting 45 lbs. 5% of the work day, 35 lbs. 33% of the time, 20 lbs. 20% of the time, and 10 lbs. constantly. As Mr. Gutridge further testified the reasonable accommodation which he thinks ComputerLand had to provide in order to allow him to continue working for ComputerLand, was to have other people momentarily assist him with lifting as needed.

Second, there are no disputes that lifting computer equipment and moving furniture which exceeds Mr. Gutridge's lifting restriction are essential functions of a ComputerLand service technician, and that Mr. Gutridge because of his lifting restriction could not perform such essential functions. Service technicians are routinely required to lift computer components and move objects such as desks and chairs which weigh in excess of forty-five pounds, and in order to perform the duties of a service technician for ComputerLand an individual has to

be able to lift weights in excess of forty-five pounds. A Job Summary which was prepared by ComputerLand in response to the request of Mr. Gutridge's physician, lists the ability to lift fifty to seventy-five pounds as an essential job function of a ComputerLand service technician, and the specification sheets for the computer components which are customarily sold, serviced, and installed by ComputerLand, show that nine of the ten computer components therein depicted exceed forty-five pounds. Even Mr. Gutridge himself testified that ComputerLand's service technicians were required to lift computer equipment, that the lifting of computer equipment in excess of forty-five and fifty pounds was required, that the lifting of heavy equipment was required, that the lifting of equipment weighing fifty to seventy-five pounds was something that ComputerLand expected service technicians to do, and that the moving of equipment which weighed as much as one-hundred pounds while working alone at a customer site was also required. If a person cannot lift or move items in excess of forty-five pounds, he or she obviously cannot perform the service and installation duties of a ComputerLand service technician. There is thus no genuine issues that lifting computer equipment and moving furniture in excess of forty-five pounds are essential job functions of a ComputerLand service technician and that Mr. Gutridge could not perform such essential functions.

Third, Mr. Gutridge's suggested accommodation of having other people assist him with lifting is not, as a matter of law, a reasonable accommodation required by the ADA. A reasonable accommodation must allow the disabled person himself to perform the job, and the ADA does not require an employer to accommodate a disabled

employee by having another employee assist the disabled employee in the performance of the disabled employee's duties. *McCollough v. Atlanta Beverage Co.*, 929 F. Supp. 1489, 1499 (N.D. Ga. 1996); *Vaughan v. Harvard Indus., Inc.*, 926 F. Supp. 1340, 1349 (W.D. Tenn. 1996). Also, ComputerLand's service operations consist of service technicians working independently with all service work to be performed at the customer's site in conjunction with "on-site" service warranties, and thus such a suggested accommodation would result in a fundamental and substantial change in ComputerLand's service technician operations because an assistant or another service technician would be required to accompany Mr. Gutridge while he performs all of his outbound service calls. The ADA does not require such an accommodation, and the ADA also does not require that ComputerLand create a permanent light duty position, or that ComputerLand create a new position such as an in-shop service technician, or that ComputerLand convert a temporary position into a permanent position. *Terrell v. USAir, Inc.*, 955 F. Supp. 1448, 1455 (M.D. Fla. 1996); *Vaughan*, 926 F. Supp. at 1348-49.

Thus, Mr. Gutridge is not a qualified individual under the ADA, and summary judgment was therefore properly granted and affirmed because of the absence of evidence establishing a *prima facie* case on this element of Mr. Gutridge's ADA claim.

WAYNE CLURE'S INDIVIDUAL LIABILITY

As alleged in Mr. Gutridge's Amended Complaint, ComputerLand is a Nebraska corporation and at all times relevant herein Wayne Clure was employed as ComputerLand's president and was acting in the scope and course

of such employment. The Affidavit of Mr. Clure supports such allegations and it further establishes that Mr. Gutridge was an employee of ComputerLand and that at no time did Mr. Clure ever personally hire or employ Mr. Gutridge. There is thus no factual dispute that ComputerLand and not Mr. Clure, was Mr. Gutridge's employer.

There is also no dispute that the ADA provides for employer liability and not individual employee liability. *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996); *U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279 (7th Cir. 1993). The definition of employer under the ADA is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person. . . . " 42 U.S.C. § 12111(5)(A). The Seventh and Eleventh Circuits have held that the term "agent" was included in the definition for purposes of ensuring *respondeat superior* liability and not to render decision-making employees vulnerable to individual liability. *Mason*, 82 F.3d at 1009; *AIC Security*, 55 F.3d at 1281. The Eleventh Circuit made this very clear when it held: "The plaintiff argued for individual liability because the definition of employer includes 'any agent of such person.' We agree with the Seventh Circuit that the 'agent' language was included to ensure *respondeat superior* liability of the employer for the acts of its agents. . . . " *Mason*, 82 F.3d at 1009. The definition of "employer" is thus to be construed the same as that term is construed under Title VII of the Civil Rights Act and the Age Discrimination In Employment Act, which preclude individual liability for persons other than employers. *Mason*, 82 F.3d at 1009. *See also Lenhardt v. Basic Inst. of Technology, Inc.*, 55 F.3d 377,

379-81 (8th Cir. 1995) (holding that the Missouri Human Rights Act, which defined employer similarly to Title VII of the Civil Rights Act and the Age Discrimination In Employment Act, did not allow for individual liability). Thus, as a matter of law, Wayne Clure has no individual liability and summary judgment was properly granted and affirmed on such basis.

CONCLUSION

For the reasons given herein, the Respondents respectfully request that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

MIDLAND COMPUTER, INC., d/b/a COMPUTERLAND OF NEBRASKA, a/k/a COMPUTERLAND; and WAYNE CLURE as President of ComputerLand, Individually, Respondents,

JEFF C. MILLER
Counsel of Record
DUNCAN A. YOUNG
YOUNG & WHITE
8742 Frederick Street
P.O. Box 241358
Omaha, NE 68124-5358
(402) 393-5600
Attorneys for Respondents